

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 1, 2005 Session

PHYLLIS I. SUITS v. M & M MARS

**Direct Appeal from the Chancery Court for Bradley County
No. 99-292 Jerri S. Bryant, Chancellor**

Filed October 5 2005

No. E2004-02368-WC-R3-CV - Mailed August 30, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded plaintiff 25 percent disability to the body as a whole as a result of sustaining a neck injury but dismissed plaintiff's claim for depression and a lung injury. On appeal plaintiff contends the court was in error in determining she had made a meaningful return to work and the award for the neck injury should have been larger. Plaintiff also cites error for dismissing the lung and depression claims. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and WILLIAM H. INMAN, SR. J., joined.

Harry F. Burnette and Doug S. Hamill, Chattanooga, Tennessee, for Appellant, Phyllis I. Suits.

Jeffrey L. Cleary and Dana L. Loftis, Chattanooga, Tennessee, for Appellee, M & M Mars.

MEMORANDUM OPINION

In this case the plaintiff, Phyllis I. Suits, has appealed from the entry of a Chancery Court judgment awarding her 25 percent permanent partial disability to the body as a whole as a result of sustaining a neck injury. The Chancellor dismissed her claim for a psychological injury (depression) and an injury to her lungs.

General Facts

Plaintiff, a fifty-year-old college graduate with a degree in medical technology, began working for defendant, M & M Mars, during 1991. She was employed as an analytical technician in the candy company's laboratory where her duties required her to test chocolate syrup for quality purposes. On about October 11, 1998 she was on top of an eighteen-wheel tank truck taking a sample of chocolate syrup when she lost her balance and started to fall but caught a safety rail on the truck which prevented her from falling to the ground. She testified the incident caused an injury to her neck although she continued to finish work that day and she did not miss any work until the following month of November when she requested and took a period of family leave. The incident was reported to the plant nurse, Patsy Gooden, and she referred her to the plant doctor, Dr. Allan Chastain.

Plaintiff testified she takes a lot of pain medication, suffers from depression and has asthma attacks. She claims all of these problems resulted from the October 11 work incident. During her testimony, she admitted she had previously been treated for neck problems but that had been much better before the incident in question. She also admitted that years prior to the October 11 incident, she had emotional problems about her marriage that ended in a divorce; she was having problems with her teenage daughter; she had remarried and divorced a second time; and that she had seen a psychologist during 1992-1994 and again in 1998 in connection with the daughter's problems although she later testified she began to tell the psychologist about some of her personal problems.

The record indicates that while she was off on personal or family leave, she had bladder surgery which was not work-related but which required a four to six week recovery period. She returned to work during April 1999 at the same rate of pay and she said her employer attempted to accommodate all of her work restrictions. She worked at the same job until February 24, 2000 when she was terminated for "job abandonment".

Patsy J. Gooden, a registered nurse and the plant nurse, testified by deposition and stated that when the plant doctor was aware her neck injury was not improving, he referred her to Dr. Boehm who she had previously seen for a neck problem. She also stated that she was aware of her taking personal or family leave because of depression from personal problems but was never on notice that it had anything to do with the accident at work.

George Linden, personnel manager of M & M Mars, testified that when she returned to work they provided accommodations for all of her medical restrictions and one such accommodation was an assistant to go upon a tank truck and obtain samples of chocolate syrup. He said after a period of several months, there was concern the plaintiff was not doing 100 percent of her job even with the accommodations they had provided. So he met with her and advised her of this concern and requested she perform all of the duties of her job. He stated that she did not come to work the next day which was a Friday and she also missed work the following week from Monday through Thursday. As to the Friday absence, he said a voice mail message had been received which requested an absence for that day and that another employee, Dave Cox, had received a voice mail

message for the Monday absence. He said there was no request for being absent Tuesday through Thursday and therefore she was terminated on Friday for being absent without permission those three days and for not calling in or taking vacation days to cover the time off.

Dr. Susan O'Hara, a clinical psychologist, testified by deposition and stated she saw plaintiff twice in February 1994 and that she was very upset and depressed over marriage and family problems with her son and daughter. The next time she saw her was on July 19, 1998 when she also brought her daughter to the counseling session. At another visit during November 1998, plaintiff indicated she had remarried and was having marriage problems in the second marriage. Dr. O'Hara said she did not mention anything about an injury at work but indicated she was taking family leave from work as she could not work because of the stress on her and she was becoming very depressed.

Medical Evidence

Dr. Walter M. Boehm, a neurosurgeon, testified by deposition and stated he treated plaintiff for her neck injury. He had seen her prior to the accident in question in 1995 for neck problems. He stated a MRI study in 1995 indicated a disc rupture at C6-7 level and that when he began seeing her again in 1998, another MRI study did not show a rupture but indicated a bulging disc at the same level. She told the doctor that prior to the 1998 work incident, she had intermittent problems with her neck. Dr. Boehm was of the opinion she had a 10 percent impairment as a result of cervical spine injury on October 11, 1998. The doctor felt she did not need any therapy and that she could continue to work with certain restrictions of lifting, climbing, etc.

Dr. Fred A Killeffer, also a neurosurgeon, testified by deposition and stated he saw plaintiff one time on July 8, 1999 for an independent medical examination. In the history he took, plaintiff indicated she had recovered from the 1995 neck problem and that she had asthma problems all of her life. In examining her medical records, he did not find any evidence of trauma and was of the opinion she did not have any permanent impairment.

The deposition of Dr. Kevin R. Ferguson, a psychiatrist, was introduced into evidence to support plaintiff's claim for the psychological injury of depression. The doctor testified he began treating plaintiff on April 17, 2002 at his office but he had seen her before for several counseling sessions at a counseling center. He stated she was suffering from major depression and that any type of anxiety with depression can make an individual short of breath. He was of the opinion that her depression had resulted from the October 11, 1998 work-related injury and he based his diagnosis on the history she gave him indicating that prior to the accident, she had not had any psychiatric problems and was very happy and had a good life. The doctor felt she had a 70 percent impairment which was a Class IV, marked impairment, under the AMA Guidelines. In evaluating her condition he admitted he did not have the benefit of any of her medical records from other doctors and that his five pages of progress notes did not indicate any diagnosis or mention of permanent impairment.

The deposition of Dr. Suresh Enjeti was introduced to support plaintiff's claim of a lung injury. The doctor said he specialized in pulmonary disease and intensive care. He said plaintiff was

first seen at their office by Dr. Jeffrey Werchowski during November 1997 and that Dr. Werchowski had left their practice but he had the medical notes of the doctor. The notes indicated plaintiff had given a history of having asthma symptoms going back to her childhood and that she complained the chemicals in the raw materials at work had made her breathing condition worse. Dr. Wechowski concluded the patient had “obstructive airways disease with reversibility consistent with asthma”.

Dr. Enjeti saw her for the first time on April 18, 2001 and stated she had “a background of symptoms, including childhood symptoms, that suggest asthma,” and that her breathing capacity had deteriorated since the visits in 1997. He opined her work environment had caused her breathing deterioration and that she had somewhere between 51 to 100 percent impairment. When he was asked if he had any specific information as to whether there were any irritants at plaintiff’s place of work in such a degree as to actually cause any irritation to her, he replied that he was just relying on her history and the fact she said irritation occurred after working. The doctor said that plaintiff’s condition could not have been caused by the October 11 incident at work and that he was unaware of that event until counsel mentioned it. He stated she did not have true occupational asthma as where the work environment was the cause of the asthma. She probably had asthmatic syndrome where chemicals in the workplace triggers a response.

Ruling of the Trial Court

After reviewing all of the evidence, the trial court awarded plaintiff 25 percent permanent partial disability to the body as a whole for her neck injury and the court dismissed the claims of a psychological injury (depression) and lung injury (breathing problem).

Standard of Review

We must review the case *de novo* accompanied by a presumption that the findings of fact by the trial court are correct unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to give considerable deference to the trial court’s findings with regard to weight and credibility of oral testimony but this court may draw its own conclusions about the weight and credibility of evidence presented by deposition. ***Carter v. First Source Furn. Group***, 92 S.W.3d 367 (Tenn. 2002).

Analysis: Physical Injury

The award of 25 percent disability for the neck injury was fixed at two and one half times the 10 percent impairment rating of the treating doctor, Dr. Boehm. The court capped the award pursuant to the provisions of Tenn. Code Ann. § 50-6-241(A)(1) upon finding the employee had made a meaningful return to work. Plaintiff contends the court erred in applying the two and one-half times cap as her return to work was not meaningful because she was not able to do her work even with accommodations from her employer and she left work because of the various work-related injuries.

Generally, in determining whether an employee's return to work was meaningful, the reasonableness test must be applied. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625 (Tenn. 1999); *Newton v. Scott Health Care Center*, 914 S.W.2d 884, (Tenn. 1991). Where the employee returns to work after being injured and after a period of time is forced to stop working because of inability to perform due to the work-related injury, such circumstances are generally considered as not making a meaningful return to work. However, if the employee returns to work and sometime thereafter stops working due to personal reasons or other reasons not related to the work injury, then such circumstances are considered as making a meaningful return to work in the sense of our statute.

In the present case, plaintiff testified she felt she was fired because of her pending workers' compensation claim and because she was not able to continue to work due to the various work injuries. The employer presented evidence that they provided help with all of her medical restrictions and that she was absent from work for three days without authorization. The trial court resolved this conflicting evidence by accepting the employer's evidence on this legal point. We cannot say the evidence preponderates against the court's conclusion.

Analysis - Psychological Injury of Depression

The Chancellor dismissed this claim upon finding the greater weight of the evidence indicated her state of depression was not related to the physical injury but was due to her many personal family problems and because of the loss of her job.

On appeal plaintiff contends the Chancellor was in error by improperly relying on a psychologist's opinion as to the cause of plaintiff's psychiatric condition and impairment and also in excluding and not considering the testimony of the only competent medical doctor as to the causation and permanency of plaintiff's condition.

Dr. Kevin Ferguson, a psychiatrist, testified concerning plaintiff's mental condition of depression. He said his opinion that plaintiff was suffering from major depression as a result of the work-related injury was based on the history plaintiff had given indicating that before the accident she was very happy, was enjoying a good life and was not suffering from any psychiatric problems. His medical notes were somewhat skimpy and never mentioned a diagnosis or impairment rating. The doctor first saw her almost three years after the accident and he did not have any medical records from other doctors.

Dr. Susan O'Hara, a clinical psychologist, saw plaintiff both before and after the accident and testified that plaintiff told her before the accident she was suffering from depression because of numerous personal family problems and after the accident she said she was not aware of a work-related injury as it had not been mentioned during her sessions with plaintiff.

The Chancellor found that Doctor Ferguson's opinion was not based on an accurate history and therefore declined to accept his opinion as to the cause of plaintiff's state of depression. We believe the greater weight of the evidence supports this finding of the trial court.

It is also argued that the trial court erred in relying on the testimony of psychologist O'Hara. We have examined her testimony closely and find that she did not attempt to diagnose her condition other than repeating what plaintiff had told her about being very depressed. She did not state an opinion as to the cause or permanency of her state of depression. We find this witness did not testify beyond her qualifications and the evidence does not preponderate against the trial court's acceptance of this evidence.

Analysis - Lung Condition

Plaintiff contends the trial court erred in dismissing her claim for a breathing problem or lung condition.

The original complaint was filed during October 1999 and alleged an accident causing a neck and back injury. During October 2002 plaintiff filed a motion to amend the complaint to allege (1) she had been exposed to certain chemicals during the course of her employment which "caused and/or exacerbated her asthma" condition and (2) she was suffering from a psychological injury as a result of the accident. The trial court allowed the amendment of the psychological injury but denied the broader claim of the lung injury as it appeared to constitute a new and different cause of action.

During March 2002 a second motion to amend was filed. The motion sought to amend to allege plaintiff was "experiencing shortness of breath and exacerbation of her respiratory problems as a result of her state of anxiety." This motion was allowed as it alleged another injury arising from the work-related accident in question.

The main expert medical evidence concerning a lung or breathing problem was the testimony of Dr. Suresh Enjeti who specialized in pulmonary problems. He testified her history of breathing problems went back to 1997 when she saw another doctor in their office and that the patient indicated she had asthma since childhood. The doctor felt her condition had changed since then and had become worse due to exposure at work to certain chemicals, fumes, etc. He gave a 51 to 100 percent impairment but testified the incident at work during October 1998 would not have caused a deterioration of her breathing or lung condition.

The Chancellor found plaintiff had a pre-existing breathing problem and that the evidence was not sufficient to connect an aggravation of this condition to the accident in question. The court also was not convinced psychiatrist Ferguson's testimony should be accepted in his effort to connect her present breathing condition to her state of depression resulting from the accident.

In our examination of the record, we conclude that Dr. Enjeti's evidence supports the new and different cause of action which the amendment to the pleadings did not allow. We do not find the evidence preponderates against the court's dismissal of this claim.

Conclusion

Having found the evidence does not preponderate against the findings of the Chancery Court, the judgment is affirmed. Costs of the appeal are taxed to plaintiff and her sureties.

ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

PYLLIS I. SUITS V. M & M MARS
Bradley County Chancery Court
No. 99-292

October 5, 2005

No. E2002- 02368-WC-R3-CV

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Phyllis I. Suits, for which execution may issue if necessary.